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Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

RALPH C. BUSS,

Petitioner,

vs.

PAINESVILLE TOWNSHIP,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS, ELEVENTH APPELLATE DISTRICT

Mark A. Kaiser
Kaiser & Kaiser
536 First Street
Geneva, Ohio 44041
(216) 466-3387
Counsel for Petitioner

30 pp

QUESTION PRESENTED

Whether the failure of the Lake County Court of Common Pleas and Ohio Court of Appeals, Eleventh Appellate District, to apply First Amendment standards adopted by this Court to respondent's application of its zoning ordinance affirmed an unconstitutional transgression of petitioner's First Amendment rights?

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Respondent's application of zoning resolution Commercial B-3 resulted in an unconstitutional prior restraint of petitioner's First Amendment right to hold political fundraiser events on his own property.

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Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the Ohio Court of Appeals, Eleventh Appellate District.

DECISIONS BELOW

The order of the Ohio Supreme Court refusing to exercise jurisdiction to hear this case appears in Appendix A of this Petition.

The opinion of the Ohio Court of Appeals, Eleventh Appellate District, affirming the trial court's order appears in Appendix B of this Petition.

The order of the Lake County Court of Common Pleas appears in Appendix C of this Petition.

JURISDICTION

The Ohio Supreme Court declined to exercise jurisdiction to decide this case on December 18, 1996. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Amendment I of the United States Constitution is set forth in Appendix D of this Petition.

STATEMENT OF THE CASE

Petitioner owns 7.7 acres of land in Painesville Township, Lake County, Ohio. He is the president of Ohio Motorcyclist

Coalition, Inc. ("OMC"), an Ohio non-profit corporation formed to "look out for biker anti-discrimination activity, and fight mandatory helmet laws in Ohio." (Tr. 200, 203) OMC employs a full-time political lobbyist, whom it pays with money it raises from political fundraisers. (Tr. 201)

OMC scheduled two political fundraisers at petitioner's property for June 11-12, and August 19-21, 1994. (Tr. 200, 214-15) These events were to feature live musical acts and political speakers, including then State Senator and recently elected United States Congressman, Dennis Kucinich. (Tr. 200, 201, 202, 203, 209-210) These events were to "provide an opportunity for people from across the State to meet and exchange ideas, discuss, of course, what's happening in the political world." (Tr. 201-02) The participants were to park and camp on petitioner's property during the events. (Tr. 203, 210-212)

Petitioner's property and the Lake County Fairgrounds are identically zoned, commercial B-3. Respondent, Painesville Township, allows the Fairgrounds to hold commercial, non-political concerts with overnight camping and parking. (Tr. 12-13, 28, 29, 121, 126-27, 172, 191-93)

Upon discovering that OMC wanted to hold the fund raising events, respondent filed a motion in the Lake County Common Pleas Court for a preliminary and permanent injunction enjoining the events, parking, and camping on petitioner's property.

During the injunction hearing, respondent rejected petitioner's offer to hold the political fundraisers, without camping or parking on petitioner's property (Supp. Tr. 8-9).

The trial court issued an order which states in relevant part:

> "Defendant, his agents, servants, employees, and all persons in active concert and in participation with him, are permanently enjoined, either directly or indirectly, from providing parking, overnight camping, AND ENTERTAINMENT upon defendant's property in Painesville Township, ... AND SPECIFICALLY FROM HOLDING THE PROPOSED EVENTS SCHEDULED FOR JUNE 11 AND 12, 1994 AND AUGUST 19 THROUGH 21, 1994, ACTIVITIES THAT DIRECTLY CONTRAVENE PLAINTIFF'S ZONING RESOLUTION FOR PROPERTY ZONED COMMERCIAL B-3." (Emphasis added)

The Ohio Court Of Appeals, Eleventh District affirmed the trial court order:

> "In the case sub judice, it is clear that the zoning ordinance at issue does not proscribe or in any way deter free speech, free association, or free assembly. IT ONLY PROHIBITS PARKING, UNLESS CERTAIN CONDITIONS ARE MET, AND OVERNIGHT CAMPING. APPELLANT HAS FAILED TO SHOW HOW THIS INFRINGES ON HIS FIRST AMENDMENT RIGHTS. PEOPLE COULD ASSEMBLE ON APPELLANT'S PROPERTY TO

> EXPRESS THEIR THOUGHTS AND TO ASSOCIATE AS LONG AS THEY REFRAIN FROM CAMPING OVERNIGHT ON THAT SITE." (p. 5) (Emphasis added)

This case is now before this Court on a Petition for Writ of Certiorari to the Ohio Court of Appeals, Eleventh District, which affirmed the trial court's order.

ARGUMENT

RESPONDENT'S APPLICATION OF ZONING RESOLUTION COMMERCIAL B-3 RESULTED IN AN UNCONSTITUTIONAL PRIOR RESTRAINT OF PETITIONER'S FIRST AMENDMENT RIGHT TO HOLD POLITICAL FUNDRAISER EVENTS ON HIS OWN PROPERTY.

The First Amendment provides in relevant part: "Congress shall make no law ... abridging the freedom of speech. ..." The Fourteenth Amendment makes this limitation on governmental authority applicable to Ohio and its political subdivisions. Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed.2d 1138 (1925); Lovell v. Griffin, 303 U.S. 404, 58 S.Ct. 666, 82 L.Ed. 949 (1938).

The Court has recognized that "[a] special respect for individual liberty in the home has long been part of our culture and our law ... and that [the government's] need to regulate temperate speech from the home is surely much less pressing" than its need to regulate speech on public streets and in public facilities. City of Ladue v. Gilleo, 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 37,

49 (1994). Governmental regulation of the content of speech of private citizens on private property bears a strong presumption of unconstitutionality. Id. at 50. (O'Connor concurring)

Moreover, courts are required to subject governmental prior restraints upon First Amendment freedoms to the closest scrutiny. Near v. Minnesota, 283 U.S. 697, 716, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). Such prior restraints are presumed unconstitutional. Id. A prior restraint is justified only where the government can show that the activity restrained poses a clear and present danger of a serious and imminent threat to a protected competing interest. Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962). The government must also show "that the restraint was narrowly drawn and would be effective to thwart the threatened danger, and that no reasonable, less restrictive alternative means existed to quell the danger." Nebraska Press Association v. Stuart, 427 U.S. 539, 562, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

Moreover, political speech deserves special First Amendment protection Mills v. Alabama, 384 U.S. 214, 218, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966), because it is "the essence of self government." Garrison v. Louisiana, 379 U.S. 64, 74-75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). Governmental regulation of political speech must be necessary to serve a compelling state interest and be narrowly applied to achieve that end. Perry Education Assn. v. Perry Local Educators'

Assn., 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). A reviewing court must subject a government's application of a law to regulate or to eliminate political speech to the "most exacting scrutiny." United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); Boos v. Barry, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988).

Moreover, in Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), the Court recognized that "(m)usic, as a form of expression and communication, is protected under the First Amendment." Government may regulate the time, place and manner of a concert event, "provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" Id. at 791, quoting, Clark v. Community For Creative Non-Violence, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

A review of the trial court record shows that it never applied any of the above mentioned standards to determine whether respondent's regulation of petitioner's political fundraising concerts was justified. It failed to apply the standards adopted by this Court for regulating temperate speech on private property, for enforcing a prior restraint on expression, for regulating political speech, or for regulating musical events.

The Court Of Appeals admitted that petitioner could exercise his First Amendment right to engage in political expression on his own property, but affirmed the trial court's order which enjoined the political fundraisers. The trial and appellate courts' failure to subject respondent's application of its zoning ordinance to the above mentioned First Amendment standards caused an obvious and serious transgression of petitioner's First Amendment rights.

REASONS FOR GRANTING THIS WRIT

There are two reasons that this Court should grant this writ.

Reason No. 1. The trial court and appellate court refused to subject respondent's application of its zoning ordinance to objective First Amendment standards adopted by this Court.

Where, as here, courts refuse to apply objective standards designed to assure that First Amendment rights are not transgressed, there exists a real danger that American citizens will be denied the enjoyment of these rudimentary rights.

This Court must hear this case and remand it to the trial court with an order directing the trial court to apply these standards to respondent's application of its zoning resolution to make sure that petitioner's First Amendment rights are protected.

Reason No. 2. The trial court and appellate court's refusal to apply First Amendment standards adopted by this Court resulted in an affirmance of respondent's unconstitutional application of its zoning ordinance.

Respondent applied said zoning ordinance as a prior restraint of petitioner's right to express himself on his own property, to engage in political speech, and to listen to music.

Respondent applied the same zoning ordinance to permit a public facility to engage in non-political, commercial speech on public property, and to listen to music.

Respondent's two applications of the same zoning ordinance afforded greater First Amendment protections to commercial, non-political speech on public property than to political speech by private citizens on private property, though this Court's precedents require an opposite result.

This Court should hear this case, and reverse the holding of the Ohio Court of Appeals, Eleventh Appellate District.

Respectfully submitted,

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APPENDICES

Appendix A: Order of Ohio Supreme Court

THE SUPREME COURT OF OHIO

FILED DEC 18 1996

MARCIA J. MENGEL,CLERK

SUPREME COURT OF OHIO

1996 TERM

Painesville Township, :
Appellee, : Case No. 96-1567

v. : E N T R Y

Ralph C. Buss, :
Appellant. :

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Ralph C. Buss.

(Lake County Court of Appeals; No. 94L101)

THOMAS J. MOYER
Chief Justice

Appendix B: Opinion of Ohio Court of Appeals, Eleventh Appellate District.

COURT OF APPEALS

ELEVENTH DISTRICT

LAKE COUNTY, OHIO

JUDGES
HON. DONALD R. FORD, PJ.
HON.JOSEPH E. MAHONEY, J.
HON. ROBERT A. NADER, J.

PAINESVILLE, TOWNSHIP,

Plaintiff- Appellee,

-vs-

RALPH C. BUSS,

Defendant-Appellant

ACCELERATED
CASE NO. 94-L-101

OPINION

JUDGMENT: Affirmed

CHARACTER OF PROCEEDINGS; Civil Appeal from Common Pleas Court Case No. 94 CV 00643

JUDGEMENT: Affirmed

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Painesville, OH 44077

(For Defendant-Appellant)

ATTY. MICHAEL C. LUCAS
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(For Plaintiff-Appellee)

MAHONEY, J.

Appellant, Ralph C. Buss, is the owner of two parcels of land in Painesville Township that total approximately nine acres. There are no permanent structures on the property, however, there is a house trailer, two tag-along trailers, pallets, empty fifty-five gallon drums, a food stand and a small amphitheater.

Appellee, Painesville Township, has established land use regulations pursuant to R.C. 519.02, through its enactment of the Painesville Township Zoning Resolution ("Zoning Resolution"). Appellant's property is zoned Commercial B-3. Pursuant to section 24.01 of the Zoning Resolution, permitted uses in a Commercial B-3 district include all uses permitted in a B-1 (restricted retail) and B-2 (general retail) district plus certain other specified uses.

During the Memorial Day weekend of May 28 through May 30, 1994, the Tour '94 Motorcycle Rodeo was scheduled to be held at the Lake County Fairgrounds in Painesville Township. In conjunction with this event, appellant planned on permitting motorcyclists who attended the

rodeo to camp on his land without a charge. Ancillary to the camping that would occur, motorcycles would be parked on appellant's property adjacent to where the motorcyclists slept. Additionally, appellant was planning on scheduling live entertainment in the form of country music acts to perform on his property for the enjoyment of the guests. It is clear that appellant's actions were strictly gratuitous as he would not be accepting any remuneration for his efforts. Appellant estimated that approximately four hundred motorcyclists would be camping on his property.

Further, it is apparent that appellant had used his property in a similar fashion both in 1992 and 1993 without objection from appellee.

Additionally, on the weekends of June 11 and 12, 1994, and August 19, 20, and 21, 1994, appellant had planned to again permit motorcyclists to use his property for camping in conjunction with other events sponsored by motorcycle organizations. For the June event, appellant had installed electric power to the premises, and obtained a liquor permit for the event which included live performances by country music recording artists. Food vendors had been placed under contract and arrangements for porta-potties had been made. The June event was referred to as "Painesville Jam '94" and the August event was to be called "Summerbash Party."

On May 17, 1994, appellee filed a complaint for temporary restraining order and preliminary and permanent injunction in the Lake County Common Pleas Court. Appellee alleged that appellant would be violating the Zoning Resolution by permitting free parking and overnight camping for all three events and by illegally conducting both the Painesville Jam '94 and the Summerbash Party. Appellee further alleged that the overnight camping of motorcyclists would constitute a public nuisance.

On May 23, 1994, the trial court conducted a hearing on appellee's request for a temporary restraining order. On May 26, 1994, the trial court granted the temporary restraining order, finding that:

> "*** Ralph Buss is committing illegal acts and is about to commit illegal acts as set forth in plaintiff's complaint, and will continue to do so unless restrained by order of this Court. It also finds that immediate and irreparable injury will result to plaintiff by defendant Ralph Buss' proposed illegal use of his land, to wit by permitting free parking and overnight camping in conjunction with the Tour '94 Motorcycle Rodeo at the Lake county [sic] Fairgrounds on May 28, through 30, 1994."

Subsequently, on June 7, 1994, the trial court conducted another hearing. The topic of the hearing was appellee's motion for a preliminary and permanent

injunction. Following the hearing, the trial court entered an order granting both a preliminary and permanent injunction. Again, the court found that appellant was engaged in committing, and would continue to commit, acts to the irreparable injury, loss, and damage to appellee. Additionally, appellant was ordered to remove, within a reasonable time, the house trailer, the two small tag-along trailers, the pallets, the fifty-five gallon drums, and any other non-conforming temporary structures.

From that decision, appellant timely filed a notice of appeal and has set forth two assignments of error.

In the first assignment of error, appellant contends that the trial court erred in granting appellee's request for a temporary restraining order and a preliminary and permanent injunction.

First, appellant argues that the injunction constituted an impermissibly broad restraint on his freedom of speech, freedom of expression, freedom of association, and freedom of assembly. Appellant relies on State ex rel. Pizza v. Tom S.A., Inc. (1981), 68 Ohio Misc. 19, for the proposition that:

> "Ohio's nuisance statutes are subject, as are all statutes, to constitutional limitations. The Constitutions of both the state of Ohio and the United States prohibit governmental actions that would abridge the right of free speech,

> First and Fourteenth Amendments to United States Constitution; Section 11, Article I, Ohio Constitution, or the right to hear such speech, Brooks v. Auburn University, (C.A.5, 1969), 412 F.2d 1171, 1172." Id. at 20.

Pursuant to R.C. 519.02, a board of township trustees may create districts or zones for the purpose of promoting the public health, safety and morals. Additionally, the exclusion of specific uses from the entire territory pursuant to zoning regulations has been held not to conflict with state statutes and a is a constitutional exercise of legislative power. Columbiana v. Keister (1981), 5 Ohio App.3d 81, 83.

In the case sub judice, it is clear that the zoning ordinance at issue does not proscribe or in any way deter free speech, free association, or free assembly. It only prohibits parking, unless certain conditions are met, and overnight camping. Appellant has failed to show how this infringes on his First Amendment rights. People could assemble on appellant's property to express their thoughts and to associate as long as they refrain from camping overnight on that site.

Accordingly, the trial court properly determined that appellant's constitutional argument was not well taken.

Next, appellant argues that the township zoning resolution regarding the prohibition of free camping is

unconstitutional as it is preempted by R.C. Chapters 3733 and 4503.

R.C. Chapter 3733 provides for the regulation, licensing and assessing of fees for manufactured home parks, marinas, agricultural labor camps, recreational vehicle parks, recreational camps, and temporary park-camps. R.C. Chapter 4503 provides for the licensing of motor vehicles and includes the taxation of manufactured homes and travel trailers. The tax is in lieu of any general property tax and is imposed for the privilege of using or occupying a manufactured home or travel trailer in Ohio. R.C. 4503.06(J).

In determining whether a local ordinance conflicts with a state statute, the test is "whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." Stary v. City of Brooklyn (1954), 162 Ohio St. 120, 127, citing Village of Struthers v. Sokol (1923), 108 Ohio St. 263, paragraph two of the syllabus. As the trial court pointed out, R.C. Chapters 3733 and 4503 only preempt the licensing and taxation of travel trailers, manufactured homes and temporary park-camps.

In contrast, Painesville Township, through its zoning regulations, is attempting to prohibit certain conduct entirely. Specifically, overnight camping is not permitted in a Commercial B-3 District. Painesville Township is not attempting to license or tax travel trailers, manufactured homes or temporary park-camps. Nor are R.C. Chapters 3733

and 4503 concerned with the prohibition of overnight camping or parking under any conditions. Thus, it is clear that Painesville Township's zoning ordinance is not preempted by R.C. Chapters 3733 and 4503. Therefore, the trial court's decision on this issue was proper.

Next, appellant contends that the trial court's order granting injunctive relief based upon a violation of the Zoning Resolution was against the manifest weight of the evidence where the property was isolated, undeveloped, wooded land for which no use had been established and on which there were no buildings or permanent structures.

Appellant's contention is not well taken. Overnight camping is simply not permitted in a Commercial B-3 District. Whether or not the property is isolated, underdeveloped or wooded has no bearing on whether overnight camping was permitted. Appellant has failed to set forth exactly how these attributes of the property have any affect on whether or not a particular use is permitted in a Commercial B-3 District. A review of the Zoning Resolution does not support appellant's assertion.

Finally, appellant argues that appellee was not entitled to an injunction because there was no evidence of irreparable harm. This argument is not well taken.

Ohio courts have held that a board of township trustees need not show special damages to obtain an injunction against an

activity prohibited by zoning regulations. Shew v. Deremer (1963), 2 Ohio Misc. 65, paragraph two of the syllabus; Bridle v. Hudson Township (Jan. 25, 1989) Summit App. No. 13731, unreported. To hold otherwise would encourage violation of zoning regulations. The pertinent distinction regarding this basic requirement between statutory and equitable actions for injunctive relief is succinctly stated in Brindle, supra, at 5-6:

> "Appellants argue that the appellees must show irreparable harm or an inadequate remedy at law before equity entitles them to an injunction enjoining the construction of the tower and an order for its removal.
>
> "This argument is not well taken. The appellees were authorized by R.C. 519.24 to sue for injunctive relief. (FN3) In Ackerman v. Tri-City Geriatric and Health Care, Inc. (1978), 55 Ohio St.2d 51, 57-58 the court addressed the difference between statutory and equitable actions for injunctions:
>
> " * * *
>
> "Given the fact that statutory actions granting governmental agents the right to sue for injunctive relief have a history and purpose different from equitable actions for injunctive relief, we find that the statutory injunctions should issue if the statutory requirements are

> fulfilled to be appropriate to actions under R.C. 3721.08."

Accordingly, appellant's first assignment of error is without merit.

In the second assignment of error, appellant argues that the trial court abused its discretion in ruling that evidence regarding the Lake County Fairgrounds was irrelevant and, thus, inadmissable. Specifically, appellant focuses on the exclusion of evidence regarding Painesville Township's treatment of the Lake County Fairground, which is located in the same zoning district as appellant's property.

Appellant was attempting to establish that overnight camping has occurred at the Lake County Fairgrounds and that, therefore, it should be permitted on his property because both are zoned B-3 Commercial. The trial court did not allow this evidence to be admitted finding that it was irrelevant.

Evid. R. 401 defines relevant evidence as:

> "* * * evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Pursuant to Evid. R. 402, evidence which is not relevant is not admissable. In the present case, the focus of appellee's

action was injunctive relief against the contemplated illegal uses of appellant's property. Appellee presented evidence that overnight camping is not a permitted use within a Commercial B-3 District. The enforcement, or lack thereof, of the Zoning Resolution with respect to other properties within the township is irrelevant as it does not make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

Accordingly, the trial court did not abuse its discretion by not allowing the evidence regarding the Lake County Fairgrounds.

Appellant also argues that it was error to exclude evidence of statements made by Painesville Township Trustees James Falvey and Jeannette Crislip at a meeting regarding the motorcycle events at the Lake County Fairgrounds. Appellant asserts that this evidence was admissible to show the trustees' bias. However, the trial court states that this evidence was simply not relevant and we agree. Whether or not Mr. Falvey and Ms. Crislip are prejudiced against motorcyclists had no bearing on whether the proposed camping on the property in question violated the Zoning Resolution.

Appellant's second assignment of error is without merit.

Based upon the foregoing analysis, the judgment of the trial court is hereby affirmed.

JUDGE JOSEPH E. MAHONEY

FORD, P.J.,
NADER, J.
concur.

Appendix C: Judgment Entry of the Court of Common Pleas of Lake County, Ohio.

IN THE COURT OF COMMON PLEAS
LAKE COUNTY

PAINESVILLE TOWNSHIP	CASE No.94 CV00643
Plaintiff	
vs.	
RALPH C. BUSS	ORDER GRANTING PRELIMINARY AND PERMANENT INJUNCTION
Defendant	June 7, 1994

This matter is before the court to address plaintiff Painesville Townships request for a Preliminary Injunction. Without objection by the parties, this court proceeded to a hearing for both a preliminary and permanent injunction. Defendants earlier motion for a temporary restraining order before U.S. District Court was denied. The court having considered the verified complaint, the evidence submitted in support of the motions, and the testimony presented, concludes that defendant is actually engaged in committing and will continue to commit acts set forth below, to the irreparable injury, loss, and damage to the plaintiffs.

Further the court reincorporates its previous opinion and law cited in its Temporary Restraining Order filed on May 26, 1994, and in particular reaffirms R.C. Chapters 3733 and 4503 does not preempt

Painesville Township's zoning resolutions and that R.C. 519.24 gives Painesville Township standing to sue. The court finds that the constitutional issues raised by defendant are not applicable and that defendant's proposed occasional use of land is indeed covered by Painesville Townships zoning resolutions.

Although this court can sympathize with defendant concerning the hardship this decision will cause to the participants of the planned events, this court nevertheless must uphold the law. Defendant's proper remedy is to obtain a conditional use permit for which defendant has already applied. This court will not interfere with the proper application of Painesville Townships zoning resolutions.

Defendant, his agents, servants, employees, and all persons in active concert and in participation with him are permanently enjoined, either directly or indirectly from providing parking, overnight camping, and entertainment upon defendant's property in Painesville Township, including permanent parcel NOS. 11B-035-009 and 11B-035-010, and specifically from holding the proposed events scheduled for June 11 and 12, 1994 and August 19 through 21, 1994, activities that directly contravene plaintiff's zoning resolution for property zoned commercial B-3. Defendant is further ordered to remove within a reasonable time a house trailer, two small tag-along campers, numerous pallets and fifty-five (55) gallon drums, and other non-conforming temporary structures.

Costs are assessed against defendant.

IT IS SO ORDERED

_____

JAMES W. JACKSON
JUDGE of the Court of Common Pleas

Copies:
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Ralph C. Buss, Esq.

Appendix D: Amendment I to United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Supreme Court, U.S.
FILED
APR 21 1997
CLERK

(2)

No. 96-1505

In The

Supreme Court of the United States

October Term, 1996

RALPH C. BUSS,

Petitioner,

vs.

PAINESVILLE TOWNSHIP,

Respondent.

On Petition For Writ Of Certiorari To The Ohio Court Of Appeals, Eleventh Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

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APPENDIX

Appendix A – Ohio Revised Code Section 519.02 .... 1a

RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the Court of Appeals of Ohio for the Eleventh Appellate District. This Court of Appeals Opinion, unreported Accelerated Case No. 94-L-101, is annexed as Appendix B to the Petition for Writ of Certiorari.

The Lake County Common Pleas Court Order Granting Preliminary and Permanent Injunction (Painesville Township v. Ralph Buss, Case No. 94-CV-00643) is annexed as Appendix C to the Petition for Certiorari. (For the convenience of the Court, all citations to the Appellate Opinion and trial court Order will be referenced to the foregoing Appendices B and C attached to the Petition).

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. Section 1257(a). The constitutional question and supporting facts presented for review in the Petition are misrepresented both as to their accuracy and relevancy in the hearings and appeal before the Ohio courts. These newly presented arguments and factual misrepresentations may not be properly considered.

STATEMENT OF THE CASE

In his Petition, the petitioner has presented for this Court's consideration a constitutional question which is wholly unsupported factually by the record and, to a large extent, is newly raised.

Underlying all of petitioner's arguments and conclusions is the major premise that the Lake County Common Pleas Court and the Ohio Court of Appeals, Eleventh Appellate District, failed to apply First Amendment standards to respondent's application of its zoning resolution to petitioner's property. As a corollary, petitioner has also represented to this Court that respondent's application of its zoning resolution constituted a prior restraint on petitioner's First Amendment liberties. The record and the judgment of the trial court give no support to either of those propositions. The question presented by the petitioner, and his supporting arguments, all assume a statement of facts from evidence contorted most favorably to the petitioner and not as found by the trial court or otherwise supported by the record.

At the crux of petitioner's argument is the allegation that the application of respondent's zoning resolution proscribed free speech, free association and free assembly. Indeed, that proposition is embodied in petitioner's stated reasons for granting this writ, wherein petitioner claims that the zoning resolution application by respondent resulted in "a prior restraint of petitioner's right to express himself on his own property, to engage in political speech and to listen to music." (Petition at 8).

Respondent's application of its zoning resolution constituted action to restrain a non-permitted use within

a specific zoning classification district. The evidence elicited at trial and effectively found as fact by the trial court in its order establishes nothing more. In similar contrast to petitioner's contention that the trial court's grant of a preliminary and permanent injunction was premised on a failure to apply First Amendment standards, is the actual impact of the trial court's order, which enjoined petitioner from providing overnight camping, entertainment associated with that overnight camping, and illegal parking.

Rather than directly address the absence of the trial court's injunctive relief failing to circumvent any First Amendment right on the part of petitioner to free speech, association, assembly and expression, the petitioner has, at least for purposes of this petition, cavalierly assumed as fact the most favorable statements of evidence as if the trial court had wholly adopted the testimony of petitioner's witnesses, while entirely disregarding testimony elicited by respondent and the limited scope of its requested injunctive relief. To the contrary, the trial court was quite specific in weighing all the evidence, reaching its various conclusions, and then limiting its injunction to petitioner's illegal uses. There was no restraint whatsoever on any First Amendment activity (Petition at 22-23).

Even a casual reading of the Court of Appeals' Opinion discloses the acute factual discrepancies between the actual activities of the petitioner which were restrained by application of the respondent's zoning resolution and the contorted interpretation presented by petitioner as to his circumvented First Amendment rights. The trial court

testimony, fully reviewed in the Court of Appeals' Opinion, carefully detailed the petitioner's non-permitted use of his property for on-site overnight camping in conjunction with an off-site holiday weekend event. (Petition at 11-12), petitioner's non-compliance with respondent's parking requirements under its zoning resolution (Petition at 12), and the indisputable fact that petitioner's contemplated overnight camping is not a permitted use in the relevant district under respondent's zoning resolution (Petition at 12).

The ability of a political entity such as respondent to properly regulate land uses within its boundaries was explicitly recognized by this Court at least as early as the seminal case *Euclid v. Ambler Realty*, 272 U.S. 365 (1926). Political entities such as the respondent are granted authority both under state statute and by case law to regulate the purposes for which land may be used when the regulations are promulgated to promote the public health, safety and morals. R.C. 519.02.

Notwithstanding petitioner's attempts to superficially flavor the overnight camping prohibition and parking regulations of respondent's zoning resolution as an unconstitutional restraint upon the First Amendment by arguing that political views would be expressed and exchanged on petitioner's property, respondent in fact did not seek to proscribe any exchange of views, association or assemblage. The record below discloses that the only injunctive relief sought was to restrain petitioner's non-permitted use for overnight camping and, secondly, to insure that the relevant parking requirements for petitioner's zoning district were complied with by petitioner.

No restraint was ever requested as to any political fund-raiser. Indeed, no political fund-raiser was ever restrained.

On appeal to the Ohio Court of Appeals, Eleventh Appellate District, the petitioner sought reversal on the ground, *inter alia*, that " . . . the injunction constituted an impermissibly broad restraint on his freedom of speech, freedom of expression, freedom of association, and freedom of assembly . . . " (Petition at 14). The Eleventh District Court of Appeals reviewed the evidence, and found it sufficient to sustain the judgment of the trial court. Perhaps more importantly for purposes of this matter, the Court of Appeals determined that the scope of the injunctive relief granted only prohibited overnight camping and illegal parking. The petitioner implicitly quarrels with the Court of Appeals' determination that the trial court's injunction against overnight camping and illegal parking did not infringe on his First Amendment rights. In point of fact, the Eleventh District Court of Appeals noted the obviously narrow impact of the trial court's injunction, stating that "people could assemble on . . . [petitioner's] property to express their thoughts and to associate as long as they refrained from camping overnight on that site." (Petition at 15).

Perhaps inadvertently, the petitioner reaches the gravamen of his argument in the Petition at 6:

> A review of the trial court record shows that it *never applied* any of the above-mentioned [First Amendment] standards to determine whether respondent's regulation of petitioner's political fund-raising concerts was justified. It *failed to apply* the standards adopted by this Court for

> regulating temperate speech on private property, for enforcing a prior restraint on expression, for regulating political speech, or for regulating musical events. (Emphasis supplied).

Aside from the fact that this argument is substantively untrue, it does serve the purpose of illustrating that, despite petitioner's attempts to couch this appeal in constitutional terms, this case turns only on the fact that the trial court decision restrained overnight camping as a non-permitted use, and illegal parking. That is the sole and limited effect of the trial court's grant of injunctive relief.

This Court should not now delve into petitioner's misguided attempt to create a factual dispute as to what non-existent First Amendment activities on the part of the petitioner were restrained by the trial court's injunctive order. Factually, both lower courts found none. The deference which this Court assigns to findings of fact by the courts below is palpable. A simple statement of the Court's view of weighing the evidence and making factual determinations is found in *Norton Co. v. Dept. of Revenue*, 340 U.S. 534 (1951):

> Of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence. 340 U.S. at 538.

The trial court Order and the more expansive Court of Appeals' Opinion, appended to the Petition, intrinsically

discloses substantial evidence to support their conclusions and judgment.

Although this Court certainly has the power to accept jurisdiction of the case at bar and to make independent factual determinations, such a result would be extremely inconsistent with prior decisions on that issue. The Court noted its usual approach to factual determinations in *Pennekamp v. Florida,* 328 U.S. 331 (1946):

> While the ultimate power is here to ransack the record for facts in constitutional controversies, we are accustomed to adopt the result of the state court's examination. It is the findings of the state courts on undisputed facts or the undisputed facts themselves which ordinarily furnish the basis for our appraisal of claimed violations of federal constitutional rights. 328 U.S. at 345.

Petitioner's factual recitation of the events and mythologized nature of what activities respondent sought to restrain differs markedly with respondent's sole and exclusive desire to preclude overnight camping and illegal parking and thereby uphold its zoning resolution.

Regarding factual review on appeal, this Court has developed the "two-court rule" pertaining to cases where the facts have been reviewed by two lower courts. A statement of the rule and its underlying policy is found in *Berenyi v. District Director,* 385 U.S. 630 (1967). The Court was asked in *Berenyi* to review and reject a factual conclusion which was reached by the trial court and which was affirmed by the appellate court. The Court refused to make the factual inquiry, noting the rule as follows:

> In order to do so, we would be forced to disregard this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'
>
> The policy underlying the 'two-court rule' is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force. 385 U.S. at 635-636.

In the case at bar, the trial court determined the facts, drew conclusions from those findings, and restrained overnight camping, entertainment associated with overnight camping and illegal parking as contrary to respondent's zoning resolution. The injunctive impact of the trial court's order did not encompass any restraint on First Amendment protected activities, nor were the existence of such activities factually in the record. This evidentiary view was affirmed by the appellate court. The two-court rule precludes any further consideration of this matter on appeal.

CONCLUSION

The Eleventh District Court of Appeals' Opinion presents no disturbance of precedent and no prior restraint or prohibition on any First Amendment rights as urged in

the unrestrained hyperbole upon which the Petition is based. While all constitutional principles are unequivocally of great importance and subject to the highest standards of judicial protection, there is simply no First Amendment issue involved for application or development in this matter. What is presented is simply a political entity's enforcement of its zoning resolution to prohibit overnight camping and illegal parking. Petitioner's arguments notwithstanding, this case does not present any substantial federal question. Petitioner's arguments all presuppose the existence of facts which either were not believed or were not found by the trial court. The decisions of the Ohio courts thus rest on an adequate non-federal basis and review should be denied. It would be strikingly inconsistent with the prior decisions of this Court to accept review, and confront petitioner's newly created factual issues.

The Writ of Certiorari should be denied.

Respectfully submitted,

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519.02 Township trustees may regulate building and land use in unincorporated territory for public purpose

For the purpose of promoting the public health, safety, and morals, the board of township trustees may in accordance with a comprehensive plan regulate by resolution the location, height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lot areas which may be occupied, set back building lines, sizes of yards, courts, and other open spaces, the density of population, the uses of buildings and other structures including tents, cabins, and trailer coaches, and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of such township, and for such purposes may divide all or any part of the unincorporated territory of the township into districts or zones of such number, shape, and area as the board determines. All such regulations shall be uniform for each class or kind of building or other structure or use throughout any district or zone, but the regulations in one district or zone may differ from those in other districts or zones.